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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 154

ROSALIE JAMES, et al., *Appellants*,

vs.

ANITA VALTIERRA, et al., *Appellees*.

GUSSIE HAYES, et al.,

vs.

HOUSING AUTHORITY OF SAN MATEO.

On Appeal From the United States District Court
Northern District of California

JURISDICTIONAL STATEMENT

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THE OPINION BELOW

The Memorandum Decision of the United States District Court for the Northern District of California appears herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Declaratory and injunctive relief was sought from a three-judge panel of the federal district court below pursuant to Title 28 of the United States Code, Section 2281, for the purpose of challenging the constitutionality of Article 34 of the California Constitution and to attempt to require or enable appellants to proceed to acquire federal financing for public housing without reference to the requirements of Article 34. Plaintiff-Appellees brought a class action on behalf of the poor against Defendant-Appellants in their representative capacity, as members of the City Council of the City of San Jose, California. The City itself was not made a party to the action and neither was the State of California. Article 34 requires that any public housing entity in the State which proposes to acquire public housing for persons of low income shall first submit such proposal to its voters for majority approval at a referendum election. Appellees contended that Article 34 was repugnant to the Privileges and Immunities, the Equal Protection and the Supremacy Clauses of the United States Constitution. They also sought jurisdiction of the Court below under Sections 1331 and 1343 of Title 28 and under Section 1983 of Title 42 of the United States Code. A separate and similar action was filed about one month later than the San Jose suit against San Mateo County defendants. No appearance was made by any of the defendants of that action. The chief difference between that suit and the San Jose suit was that the San Mateo suit alleged discrimination on racial grounds as well as economic grounds.

The cases were then consolidated by the District Court for all purposes. The decision of the District Court was that Article 34 violated the Equal Protection Clause of the 14th Amendment of the United States Constitution.

(ii) The judgment sought to be reviewed is the summary judgment granted to Appellees holding Article 34 of the California Constitution to be unconstitutional and enjoining appellants from relying on its provisions as a reason for not requesting state or federal assistance with which to finance low income housing. That judgment was entered on April 2, 1970. No motion for new trial was made. The Notice of Appeal was filed in the United States District Court for the Northern District of California, the Court possessed of the record, on April 10, 1970.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Radio Corp. of America v. U.S. (D.C. Ill. 1950) 95 F.Supp. 660, affirmed 71 S.Ct. 806, 341 U.S. 412, 95 L.Ed. 1062;

Florida Lime & Avocado Growers, Inc. v. Jacobsen (Cal. 1960) 80 S.Ct. 568, 362 U.S. 73, 4 L.Ed.2d 568;

St. Louis & O'Fallon Ry. Co. v. U.S. (Mo. 1929) 49 S.Ct. 384, 279 U.S. 461, 73 L.Ed. 798;

Baker v. Carr (Tenn. 1962) 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663.

(v) The validity of Section 1 of Article 34 of the California Constitution is here involved. The full text of that article is as follows:

"§ 1. *Approval of electors; definitions*

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing

project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

"§ 2. *Self-executing provisions*

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

"§ 3. *Partial validity*

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

"§ 4. *Conflicting provisions superseded*

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)"

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

(i) Does a state constitutional provision which limits the authority of a public body of such state to develop, construct or acquire low rent housing project for persons of low income without such entity first having obtained the approval of a majority of the qualified electors of the city, town or county, in which it is proposed to develop, construct, or acquire the same, voting on such issue at an election for that purpose, or at any general or special election, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where the undisputed facts are that, with certain exceptions involving federally-owned housing, housing for public employees and housing for students at state universities and colleges, no other type of publicly-owned housing exists in such state?

(ii) Does a majority of the people of a State have the right to restrict the power of the local public bodies of such state to provide low rent housing to persons of low income of that state, where persons of low income form a "minority" of that state, but where there are in fact no public, middle or high rent projects in existence?

STATEMENT OF THE FACTS OF THE CASE

On November 7, 1950, the voters of the State of California at a general election approved an initiative measure, designated as Proposition 10, which added

Article 34 to the California Constitution. Earlier that same year, the California Supreme Court had ruled that referendums were not applicable to decisions to build public housing on the grounds that such decisions were mere administrative acts as opposed to legislative acts.[1] Whether or not this decision prompted the initiative effort is not known to the Appellants. Nevertheless, the effect of the Constitutional Amendment was to nullify the decision for future situations where a state public body seeks to acquire public housing. It limited the authority of any State public body to develop, construct or acquire low rent housing without the prior approval of a majority of the qualified electors of the city, town or county in whose jurisdiction the proposed project is to be located, who vote on the issue.

By Resolution No. 28614, dated January 17, 1966, and adopted pursuant to the provisions of Section 34242 of the California Health and Safety Code, the Council of the City of San Jose found a need for low rent housing in its community. This resolution established the Housing Authority of the City of San Jose. Of the seven members then on the Council voting on the resolution, only two were members at the time this suit was filed in the District Court below, namely, Ronald James and Virginia C. Shaffer. Mayor James, then a Councilman, voted in favor of Resolution 28614, whereas Mrs. Shaffer voted against it. It was adopted by a vote of six to one.

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[1] *Housing Authority v. Supreme Court* (June 1950) 35 Cal. 2d 550, 219 Pac.2d 457.

Almost three years later, or on November 5, 1968, a special municipal election was held in San Jose as consolidated with the State of California general election. Measure B on the ballot was as follows:

> "Shall the Housing Authority of the City of San Jose have authority to develop, construct, and acquire, in any manner selected by said Authority, a low rent housing project (as defined in Article XXXIV of the California Constitution), consisting of not more than one thousand dwelling units, subject to the following conditions: (1) not more than four such dwelling units shall be situate in any one structure, (2) not more than one structure containing any such dwelling unit shall be situate on any one lot, and (3) such dwelling units shall be dispersed among various sections of the City so that not more than twenty-four such dwelling units shall be situate within a radius of fifteen hundred feet from any other such dwelling unit."

The measure was defeated by a vote of 68,527 "against" to 57,896 "for" its approval.

It was the combination of the failure of this measure together with the requirements of Article 34 and the allegedly increased need for low rent housing units in San Jose which prompted the filing of the action below. Plaintiffs attempt to eliminate what they regard as an unfair obstacle in their path to obtain publicly-owned, low rent housing units for themselves and others of their class. The adult plaintiffs are mothers of the several respective minor plaintiffs. All are welfare recipients, residents of this City, and all live in over-crowded facilities. At least some of the

facilities are also sub-standard from the standpoint of health and safety factors.

An uncontroverted affidavit submitted by plaintiffs in support of their Motion for Summary Judgment showed that whereas in November, 1969 the City and the County Housing Authorities leased a total of 1,933 units for sublease at low rent, nevertheless, there was then an immediate need for 1,853 additional units. Whereas, none of the Appellants has admitted in Court that there is a current need for low rent housing units in the City of San Jose, nevertheless none of them has offered any evidence to refute the claim. And for purposes of this Appeal at least, current need is an established fact.

In opposition, however, to the Motion for Summary Judgment below, appellants prepared a stipulation of fact, entered into by the attorneys for the Appellees which sets forth the types of publicly-owned or leased housing in the State of California. This stipulation established as uncontroverted fact that except for federally-owned housing, housing for certain State employees, housing for college and university students, and housing acquired to clear the way for public projects such as highways, airports, streets, etc., no other type of housing is owned or leased by any state public body of the State of California for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article 34. In other words, with the above exceptions, there is no State, City or County owned or leased housing for rental to persons of middle or high incomes in California.

Also established as uncontroverted fact by plaintiffs' own affidavits, and as already noted above, Appellants, or rather the Housing Authority established by them, have acquired by lease existing housing units in the City of San Jose, for subleasing to persons of low income in this City. Such acquisition by the Housing Authority has never been submitted to the electors of this City for their approval. The reason for this is that the Attorney General of the State of California has rendered an opinion that such type of acquisition does not fall within the requirements of Article 34. (47 Ops. Cal. Atty. Gen. 17, issued January 18, 1966 as Opinion No. 65-246.)

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This appeal squarely raises the question of the right of a majority of the people of the State of California to limit the authority of its various state public bodies in such manner as does Article 34 in view of the existing facts relative to public housing of this State and the existing laws of the United States.

(i) THE DECISION BELOW ADOPTS AN INTERPRETATION OR APPLICATION OF THE EQUAL PROTECTION CLAUSE WHICH HAS NEVER BEEN USED BEFORE.

The test of equal protection has always been to determine if the challenged law adds burdens to one class or grants benefits to another to the exclusion of other persons in similar situations without adequate

or substantial justification for the different treatment.[2] The "whites" can't be favored over the "blacks", or the "browns", or the "yellows". The "rich' can't be favored over the "poor". Males can't be favored over females. In each of the cases dealing in these areas the "sides" or the "classes" were always discernible. In this decision, however, it is difficult to see who the Court felt was being treated unfairly. It is also difficult to see what class is treated differently. The Fourteenth Amendment does impose a requirement of some rationality in the nature of the class singled out.[3] But the Court's application stretches the test beyond logical limits for the purpose of striking down Article 34. The opinion states the "vice" to be that "Article XXXIV makes it more difficult for *state agencies* acting on behalf of the poor *and* the *minorities* to get federal assistance for housing than for *state agencies* acting on behalf of other groups to receive financial federal assistance." Is the Court now taking the position that the Fourteenth Amendment is to be extended to protect state agen-

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[2]*Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh. den. 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288;
Truax v. Corrigan, 257 U.S. 312, 66 L.Ed. 254, 42 S.Ct. 124, 27 A.L.R. 375;
Mountain Timber Co. v. Washington, 243 U.S. 219, 61 L.Ed. 685, 37 S.Ct. 260;
Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 43 L.Ed. 909, 19 S.Ct. 609;
Marchant v. Pennsylvania R. Co., 153 U.S. 380, 38 L.Ed. 751, 14 S.Ct. 894;
McPherson v. Blacker, 146 U.S. 1, 36 L.Ed. 869, 13 S.Ct. 3;
State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, affd. 238 U.S. 611, 59 L.Ed. 1488, 35 S.Ct. 792.

[3]*Rinaldi v. Yeager*, 384 U.S. 305, 16 L.Ed.2d 577, 86 S.Ct. 1497.

cies? Of course not.[4] But if not, and if it is merely the poor the Court was concerned about, who composes or makes up the "other groups" referred to? The Court refers to "common examples" as groups who benefit from federal financing for "highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities". Is this classification suggested by the Court rational? Appellants maintain it is not. To follow through on the logic of the Court's rationale, is not the Court holding that the Fourteenth Amendment says that if the poor are able to benefit from model city programs without need for a referendum, they should also be allowed to benefit from low rent housing programs in the same way? To put it another way, the Court seems to suggest that referendums, to be fair, must apply to *all* decisions regarding the seeking of federal financing, or to *none* at all. It is Appellants' position that, while not a literal statement of the Court's reasoning, it is nevertheless an accurate paraphrase. Such reasoning is not an attack which relies, however, on the accepted principle that the rich and the middle class cannot be given public benefits from which the poor are excluded. What the Court is saying is that, given a certain "open door" policy at the local level with respect to seeking one form of federal financial assistance, such policy should apply across the board to the seeking of all other forms of federal financial assistance

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[4] *Williams v. Baltimore*, 289 U.S. 36, 77 L.Ed. 1015, 53 S.Ct. 431;
Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271.

alike. It is an attempt to attain equality in "enjoyment" rather than equality of "right". But such is clearly not the law under the Fourteenth Amendment, and it never has been.[5] If such were to become the law, however, legislative discretion to set conditions as a prerequisite to seeking federal financial assistance may well become a thing of the past.

The greater part of all legislation is discriminatory in the extent to which it operates, the manner in which it applies, or the objects sought to be attained by it.[6] Article 34 is no different. But there are legitimate reasons for having, or not having, publicly owned low rent housing units in some communities while not in others. No one, neither the Court below nor Plaintiffs, have asserted otherwise. In fact, a list of these legitimate local concerns presented to the Court below in briefs were not disputed, and the Court even acknowledged the existence of such reasons in its opinion. The important fact in California which the Court below failed to consider, however, is, that, because in California there exists only low rent public housing, and no other type (except for certain minor exceptions), Article 34 treats *all* public housing alike.

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[5]*Coppage v. Kansas*, 236 U.S. 1, 59 L.Ed. 441, 35 S.Ct. 240; *Chicago v. Rhine*, 363 Ill. 619, 2 N.E.2d 905.

[6]*Hill v. Rae*, 52 Mont. 378, 158 Pac. 826.

(ii) UNTIL THE DECISION BELOW, IT HAS ALWAYS BEEN A BASIC RULE OF DEMOCRATIC GOVERNMENT THAT AS LONG AS LEGISLATIVE BODIES DO HAVE DISCRETIONARY POWERS, AND TO THE EXTENT THAT THEY SO DO, THIS DISCRETION CAN BE LIMITED OR SHARED BY THE MORE SUPREME POWER, THE POWER OF THE PEOPLE THEMSELVES ACTING WITHIN, AND IN CONCERT WITH, THEIR CONSTITUTIONAL RIGHTS.

What Appellants urge is that, as long as legislative bodies do have discretionary powers,[7] and to the *extent* that they so do, this discretion can be limited or shared by the more supreme power, the power of the people themselves acting within, and in concert with, their Constitutional rights.[8]

Appellants do not make the argument that the "majority" of voters can discriminate against the "minority" of voters. But to the extent that legislative action, discretion and decisions can constitutionally be made at the local level by the local legislative body, and to the extent that a republican form of government involves the concept of majority rule, that action, discretion and decision can be shared by the voters of that local public entity.

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[7] *Morey v. Doud*, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344;
Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 96 L.Ed. 469, 72 S.Ct.405, reh. den. 343 U.S. 921, 96 L.Ed. 1334, 72 S.Ct. 674;
Sproles v. Binford, 286 U.S. 374, 76 L.Ed. 1167, 52 S.Ct. 581;
Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148.

[8] *Cochran v. Louisiana State Bd. of Education*, 281 U.S. 370, 74 L.Ed. 913, 50 S.Ct. 335;
Maynard v. Board of Canvassers, 84 Mich. 228, 47 N.W. 756;
Art. IV, § 4 and Tenth Amendment to U.S. Constitution;
Ware v. Hylton, 3 Dallas (U.S.) 199, 1 L.Ed. 568.

The case of *Hunter v. Erickson,* 393 U.S. 385, 21 L.Ed.2d 616, 89 S.Ct. 557, relied upon the Court's opinion below, albeit, a case involving a referendum requirement limiting the authority of a local government, is, nevertheless, distinguishable, and should be distinguished, on its facts. The decision below is an overly broad application of the principles enunciated by the Supreme Court in *Hunter,* and is not justified by the decision in that case.

The judgment and decision below squarely puts into jeopardy the right or the power of the people to decide, *before* the fact, whether or not to extend a given benefit, such as low rent housing, to a class of people such as the poor. As long as there is no *duty* to extend such benefit; as long as the enjoyment of such benefit is a mere privilege; as long as the same benefit has not been conferred on others; and as long as a given legislative body would have the power to make such a decision, then the voters who elected the members of that legislative body should have the power to restrict such decision making power in such a way as to share it with those elected members.

(iii) THE DECISION BELOW HAS PLACED A CLOUD UPON THE ABILITY OF HOUSING AUTHORITIES IN THE STATE OF CALIFORNIA TO PROCEED TO DEVELOP, CONSTRUCT, OR ACQUIRE LOW RENT HOUSING WITHOUT FIRST COMPLYING WITH THE PROVISIONS OF ARTICLE 34.

At this time neither HUD officials nor law firms who specialize as bond counsel can assure Appellants, or housing authorities of this state that Article 34 can be ignored until such time as the matter has been finally decided by the United States Supreme Court. HUD officials have informally told Appellants that they are not sure if an application made to them for funds by a California Housing Authority without compliance with Article 34 would be favorably accepted until the Supreme Court rules on the matter. Competent bond counsel have advised Appellants that, until such time as the constitutionality of Article 34 has been ruled upon by the Supreme Court, they could not render an opinion to prospective purchaser-investors as to the validity of revenue bonds sold for the construction or acquisition of such housing units in California. Furthermore, Appellants are informed by the United States Attorney's Office that similar legislation exists in the States of Minnesota, Nebraska, South Dakota, Texas, Vermont and Virginia. Therefore, Appellants submit, the federal questions involved are of urgent and substantial social concern.

CONCLUSION

The appeal raises issues of fundamental importance to our system of democratic government. The extent to which voters can participate in important, legislative decisions of social concern is being challenged and must be more clearly defined. The Court is asked at this time to preserve to the majority its right of self-determination and suffrage while at the same time the Court protects the right of the minority against discrimination.

Respectfully submitted,

DONALD C. ATKINSON,

Attorney for Appellants.

April, 1970

(Appendix A Follows)

Appendix A

The United States District Court
Northern District of California

Anita Valtierra, et al., Plaintiffs, vs. The Housing Authority of the City of San Jose, et al., Defendants.	No. 52076
Gussie Hayes, et al., Plaintiffs, vs. Housing Authority of San Mateo, Defendant.	No. C-69-1-RFP

Before HAMLIN, Circuit Judge, and PECKHAM and LEVIN, District Judges.

PECKHAM, District Judge:

This matter comes before this Court on plaintiffs' motions for summary judgment, their applications for an injunction, and defendants' motions to dismiss. Plaintiffs ask that we declare Article XXXIV of the California State Constitution[1] to be unconstitutional

[1] ARTICLE XXXIV
PUBLIC HOUSING PROJECT LAW
§ 1. Approval of electors; definitions
Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, con-

and request that we forbid defendants from relying upon it as a reason for not requesting federal assistance with which to finance low-income housing. We hold Article XXXIV to be unconstitutional. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Title 42 U.S.C. § 1983 creates a cause of action for the deprivation, under color of state law, of any right, privilege or immunity guaranteed by the United States Constitution. In this case, the non-federal defendants are acting under color of Article XXXIV in not requesting federal assistance. Equal protection cases brought to remedy discrimination against the poor (*e.g., Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)), have long been entertained under § 1983. Jurisdiction to hear this case is conferred upon this Court by 28 U.S.C. § 1343(3), (4).

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struct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by garanteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

This case is required to be heard by a three-judge court by 28 U.S.C. §§ 2281, 2284, as plaintiffs seek an injunction enjoining defendant local officials from enforcing a state constitutional provision (see *A.F.L. v. Watson,* 327 U.S. 582 (1946)) on the ground of its repugnance to the Equal Protection Clause.

Two cases are consolidated for consideration. The first is *Valtierra v. Housing Authority of San Jose,* No. 52076. The parties plaintiff are "persons of low income," who have been determined to be eligible for public housing, and have been placed on the appropriate waiting lists. They are unable to occupy public housing because at present none is available. The second case, *Gussie Hayes, et al. v. Housing Authority of San Mateo,* No. C-69-1-RFP, is consolidated with the first because of the identity of the legal issue, and is brought by similarly situated poor persons, predominately Negro, on the waiting list for public housing in San Mateo County.

Plaintiffs have demonstrated that Article XXXIV has impeded the financing of new housing, only 52% of the referenda submitted to the voters have been approved, even though they cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built. In Santa Clara County, the voters defeated the referendum seeking permission to obtain housing funds in 1968, and in San Mateo County two similar referenda were defeated in 1966. Housing Director Wemen, in San Mateo County, feels it would be fruitless to attempt another referendum at present. [Affi-

davit J to *Hayes* complaint.] Plaintiffs' position is that but for the existence of Article XXXIV, local housing authorities would be able to apply for federal assistance if they chose; they further submit that there is evidence that in fact they would so choose. [See *Valtierra* complaint p. 8).

There are three groups of defendants in the *Valtierra* case: the Housing Authority of the City of San Jose, a public entity, and its members in their official capacity; the City Council of San Jose, a public entity, and its members, in their official capacity; and the Department of Housing and Urban Development and its Secretary, George Romney. All three groups have filed responsive pleadings. There is only one defendant in the *Hayes* case, the Housing Authority of San Mateo County. The Court notes that this defendant has not made an appearance in the case, but rather has chosen to stand mute.

The federal defendants, the Department of Housing and Urban Development (HUD), and its Secretary, George Romney, move for dismissal on the ground that, as to them, the *Valtierra* complaint does not state a claim upon which relief can be granted. Fed. R.Civ.P. Rule 12(b)(6). The complaint does not seek any relief against the federal defendants; their joinder is not necessary in order to grant the relief that is requested. Therefore this Court ORDERS that their motion for dismissal be granted. Accordingly, the federal defendants are dismissed from this lawsuit. The *Hayes* case does not involve any federal defendants.

The two non-federal defendants in the *Valtierra* case, viz., the Housing Authority of San Jose, and the City Council of San Jose, raise several pleas in abatement which do not preclude this Court from reaching the merits of plaintiffs' constitutional claim. First, defendants contend that because California could decline to participate in the program established by the Housing Act of 1937, that California can participate on any condition. This is not the case. Certainly a condition that no Negro could occupy such low-income housing would be unconstitutional. Second, they assert that referenda are not subject to constitutional scrutiny. This is not the law. *Hunter v. Erickson, supra.* Third, defendants erroneously believe plaintiffs are asking this Court to compel the Housing Authorities to seek federal funding. However, plaintiffs only seek an injunction forbidding the named local officers from relying on Article XXXIV as a reason for not requesting such funds. There may be any number of reasons, quite apart from Article XXXIV why the Housing Authorities might not wish to seek federal funds at any given point in time.

We find plaintiffs' Supremacy Clause argument to be unpersuasive and therefore do not decide the case on that ground. Plaintiffs' privileges and Immunities argument is not reached as this Court decides the case on Equal Protection grounds.

Plaintiffs' Equal Protection Argument

The starting point for this argument is the now well-established standard that classifications based on

race are "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and those based on property "traditionally disfavored," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Both bear a far heavier burden of justification than other classifications. *See, McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to "low-income persons", brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective. *E.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Carrington v. Rash*, 380 U.S. 89 (1965); *Baxtrom v. Herrold*, 383 U.S. 107 (1966); and *Rinaldi v. Yeager*, 384 U.S. 305 (1966). As characterized by the Court in *McLaughlin v. Florida*, 379 U.S. at 191:

> Judicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded.

It is no longer a permissible legislative objective to contain or exclude persons simply because they are poor. *Edwards v. Calif.*, 314 U.S. 160 (1941); *Shapiro v. Thomson*, 394 U.S. 618 (1969). *Cf., Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956).

In addition to asserting that Article XXXIV denies equal protection of the laws to persons who are poor, the *Hayes* plaintiffs assert that it also denies equal protection to those who are Negro. Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protections clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority." *Hunter v. Erickson, supra,* at 391.

Thus, last term, the Supreme Court in *Hunter v. Erickson, supra,* applied to the housing area the constitutional requirement for equal protection. In that case, the Supreme Court invalidated an amendment to the City Charter of Akron, Ohio, which required a referendum before anti-discrimination legislation could be enacted. The Court held this to be impermissible, stating that it violated the Equal Protection Clause for at least three reasons:

First, only laws designed to end housing discrimination were required to run the gauntlet of a referendum, and the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others. The *Hunter* Court speaking through Mr. Justice White states, 393 U.S. at 390-91:

> It is true that the section [requiring a referendum before action may be taken] draws no distinction among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing

> discrimination against them which they wish to end. But § 137 [requiring the referendum] nevertheless disadvantages those who would benefit from laws barring racial . . . discrimination as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual, or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Second, the law's impact falls on minorities, resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection.

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot [citation omitted], § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. [citations omitted] 393 U.S. at 391."

Lastly, the Court noted, 393 U.S. at 392:

> . . . [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain

> subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. [Citations omitted.] The sovereignty of the people is itself subject to . . . constitutional limitations. . . .

Here, as in the *Hunter* case, the "special burden" of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities.[2] The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia,* are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. Further,

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[2]That minority groups comprise "the poor" is increasingly clear. In his affidavit, Mr. Franklin Lockfeld, Senior Planner for the Santa Clara County Planning Department stated: "The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in dilapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by nonwhites were in dilapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and dilapidated housing in the County in 1960."

even though federal assistance for state housing agencies is a privilege which California need not seek at all, the requirements of equal protection must still be met. *U.S. v. Chicago, M., St.P. & P. RR.*, 282 U.S. 311, 328-29 (1931); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thomson, supra.*

Defendants argue that Article XXXIV does not violate the Equal Protection Clause because it was not the product of unconstitutional motivations. However, although proof of bad motive may help to prove discrimination, lack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.

Accordingly, plaintiff's motions for summary judgment, declaring Article XXXIV to be unconstitutional, and their applications for an injunction are granted.

It Is So Ordered.

Oliver D. Hamlin,
United States Circuit Judge,
Robert F. Peckham,
United States District Judge,
Gerald S. Levin,
United States District Judge.

Filed March 23, 1970,
Clerk, United States District Court,
San Francisco.